U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: JULY 27, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software applications development business, seeks to permanently employ the Beneficiary in the United States as a software developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This "EB-2" classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition after determining that, based on the issuance date of the Beneficiary's university statement of marks, the Petitioner had not shown that he had the five years of post-baccalaureate experience required to establish the equivalent of an advanced degree.[1]

On appeal, the Petitioner contends that the Beneficiary has the required five years of progressive post-baccalaureate experience, as the Beneficiary earned his degree prior to the date cited by the Director.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) from the U.S. Department of Labor (DOL).[2] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the

[1] The Petitioner does not claim that the Beneficiary possesses a master's degree.

[2] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). A beneficiary must be eligible as of that date, and so in this case the Beneficiary must have had the five years' requisite experience by the date the labor certification was filed.

Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

A petition for an advanced degree professional must be accompanied by documentation showing that the Beneficiary is a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(1). An "advanced degree" is defined as "[a]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree *followed by at least five years of progressive experience* in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2) (emphasis added).

Also, 8 C.F.R. § 204.5(k)(3)(i)(A) and (B) require "an official academic record showing that the alien has a United States . . . degree or a foreign equivalent degree."

II. ANALYSIS

At issue in this case is the date that the Beneficiary began to accrue the necessary post-baccalaureate experience for classification as an advanced degree professional. Specifically, the issue is whether the five years of experience required for classification as an advanced degree professional is measured from the date on which the Beneficiary received his diploma or, as claimed by the Petitioner, the date the Beneficiary passed the degree examinations, or alternatively, the date on which he became eligible for his degree.

The Beneficiary has a bachelor of engineering in computer science and engineering from the (India), which the record establishes is the foreign equivalent degree of a U.S. bachelor's degree. The Petitioner submitted a copy of the Beneficiary's bachelor of engineering diploma dated April 18, 2011, and a copy of the university statement of marks for the Beneficiary's last semester of coursework dated September 7, 2010, which reports the results of the Beneficiary's final examinations and states "result of the degree: first class."

The Director found that the Beneficiary's statement of marks was an official academic record showing that the Beneficiary was awarded his degree on September 7, 2010, and therefore, his post-baccalaureate experience did not begin to accrue until that date. Considering only experience gained from that date onward, the Director found that the Beneficiary could not have accumulated the required five years of post-baccalaureate experience by the July 15, 2015, priority date.

On appeal, the Petitioner states that the Director erred by not calculating the accumulation of post-baccalaureate experience from the date when the Beneficiary "completed all the requirements for his bachelor's degree," rather than from the degree date stated on the statement of marks. In support of its claim, the Petitioner submits a letter issued by the I/C Principal of which is identified as a part of The letter states that the results of the Beneficiary's "final semester exams/tests were published on July 5,

2010, and therefore, he has passed these exams/tests by July 5, 2010, therefore, he was eligible to be awarded the Bachelor of Engineering degree on this date as said above. As usual with any other university in India and USA, the degree/diploma certificate was awarded by the concerned University in the convocation later."

The statute and regulations governing the EB-2 classification use the terms "degree" and "official academic record," not "diplomas." For EB-2 "bachelor plus five" petitions, the "initial evidence" rule requires the submission of an "official academic record" showing that a beneficiary has a foreign equivalent "degree." 8 C.F.R. § 204.5(k)(3)(i)(B). Therefore, an "official academic record" is not limited to a diploma.[3] Accordingly, we must conduct a case-specific analysis to determine whether the Beneficiary completed all substantive requirements to earn the degree and whether the university approved the degree as demonstrated by an official academic record. To do this, we consider the individual nature of the university's requirements for the Beneficiary's program of study and his completion of those requirements. The Petitioner bears the burden to establish that all of the substantive requirements for the degree were met and that the degree was in fact approved by the responsible university body.[4]

Here, the Petitioner did not submit an official academic record demonstrating that the Beneficiary completed all substantive requirements of his degree and that the university approved the degree prior to September 7, 2010. When determining whether a document is an official academic record that substantiates the claimed degree, we may consider whether the document was issued by the university in the normal course of its business; whether the document was originally issued contemporaneous with events; and whether the document indicates that all requirements for the degree, in addition to the required coursework, have been completed.

The Petitioner did not establish that the letter from the "I/C Principal" is an official academic record that substantiates the claimed degree. The letter was written on September 1, 2017, seven years after the Beneficiary claims to have completed the degree, and was issued in response to a request from the Beneficiary, not in the university's normal course of its business. Further, the letter states only that the Beneficiary was "eligible" for the award of his degree as of July 5, 2010. Although the letter states that the Beneficiary completed the academic requirements for his degree, it does not state that all degree requirements were completed. It also does not reflect that the university approved the

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[3] *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017); *see also* USCIS Adjudicator's Field Manual, Appendix 22-1, Memorandum from Michael D. Cronin, Acting Associate Commissioner, USCIS HQ 70/6.2, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants* (March 20, 2000). https://uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-31107.html (last visited July 25, 2017) ("Whether the alien beneficiary possesses the advanced degree should be demonstrated by evidence *in the form of a transcript from the institution* that granted the advanced degree. An adjudicator must similarly consider the *baccalaureate transcript* . . . .") (emphasis added).

[4] Along with any other evidence, petitioners must also submit a copy of a beneficiary's statement of marks or transcript to demonstrate years of study and coursework completed. *See* 8 C.F.R. § 204.5(k)(3) (requiring the submission of an official academic record as evidence of a beneficiary's possession of an advanced degree or equivalent of an advanced degree).

award of the Beneficiary's degree prior to September 7, 2010. Therefore, the letter does not demonstrate that the Beneficiary completed all substantive requirements for the degree and was approved by the university for the degree as of the July 2010 date.

Based on the foregoing, we find that only experience gained after September 7, 2010, may be counted toward the required five years of post-baccalaureate experience. Considering only experience gained from that date onward, the Beneficiary could not have accumulated the required five years of post-baccalaureate experience by the July 15, 2015, priority date.

III. ADDITIONAL ISSUES OF INELIGIBILITY

Because we conclude that the Petitioner did not demonstrate that the Beneficiary possesses an advanced degree as is required for classification as a professional holding an advanced degree, we need not fully address other issues evident in the record. That said, we will briefly identify two additional grounds of ineligibility that were not addressed by the Director. The Petitioner must resolve these issues in any future filings.

A. Petitioner's Ability to Pay

First, the petitioner must demonstrate its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The priority date in this case is July 15, 2015, and the proffered wage is $152,776. The Petitioner provided an IRS Form W-2, Wage and Tax Statement, showing it paid the Beneficiary $93,515.76 in 2015, and a copy of a paystub showing it had paid the Beneficiary $7,392.31 as of January 31, 2016. However, the record does not any contain annual reports, federal tax returns, or audited financial statements to establish the Petitioner's ability to pay the difference between the proffered wage and the wages actually paid to the Beneficiary; that is, $59,260.24 in 2015 and $145,383.69 in 2016. This evidence must be provided in any future proceedings.

B. Beneficiary's Experience

Second, the Petitioner has not established that the Beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In this case, the labor certification states that the offered position requires 60 months of experience in the offered position of software engineer, or in the alternate occupations of a programmer analyst, or in a related field. On the labor certification, the Beneficiary claims to qualify for the offered position based on his experience working for [redacted] in [redacted] India, as a

part-time junior software engineer from September 2009 through October 2010, and full-time as a senior software engineer from October 2010 through January 2013. The Beneficiary also listed his work as a programmer analyst for the Petitioner since January 2013; however, according to DOL regulations a beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the offered position unless the experience was "in a position not substantially comparable to the position for which certification is being sought." *See* 20 C.F.R. § 656.17(h)(4)(i)(3). "Substantially comparable" is defined in the DOL regulations at 20 C.F.R. § 656.17(i)(5)(ii) as "a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records."

We note that the Petitioner indicated on the labor certification that the Beneficiary did not "gain any of the qualifying experience with [the Petitioner] in a position substantially comparable to the job opportunity requested." While the Petitioner stated in response to the Director's request for evidence that the two jobs are not substantially comparable, we note many of the job duties listed for the Beneficiary's work as a programmer analyst match the listed duties of the offered job. The Petitioner has not previously been requested to provide position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records to document whether the Beneficiary's work as a programmer analyst and the offered job are substantially comparable. If they are, according to DOL regulations, the Petitioner could not rely on this experience for the Beneficiary to qualify for the proffered position and the record would not establish that the Beneficiary possessed the required five years of experience, regardless of the date utilized to calculate the Beneficiary's post-baccalaureate experience. Evidence addressing whether the two positions are substantially comparable must be provided in any future proceedings.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary completed all substantive requirements to earn his degree and that the university approved his degree at any time prior to September 7, 2010. For this reason, we find that the Beneficiary did not have a minimum of five years of qualifying post-baccalaureate employment experience as of the petition's July 15, 2015, priority date. Therefore, the Petitioner has not established that the Beneficiary meets the requirements for EB-2 classification.

In addition, the Petitioner has not established that the Beneficiary possesses five years of post-baccalaureate experience as required on the approved labor certification. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 460352 (AAO July 27, 2017)